

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Hercules E. Vincent Z-433-40-8544-D2

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2239

Hercules E. Vincent

This appeal has been taken in accordance with Title 46 United States Code 239(g), and Title 46 Code of Federal Regulations 5.30-1.

By order dated 10 August 1978, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for three months, plus six months on twelve month's probation, upon finding him guilty of misconduct. The specification found proved alleges that while serving as Fireman/Watertender on board SS AFRICAN DAWN under authority of the document above captioned, on or about 8 May 1978, Appellant did wrongfully assault and batter with his hand the Third Assistant Engineer.

The hearing was held at New York, New York, on 22, 23 and 27 June 1978.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of the Third Assistant Engineer and two pieces of documentary evidence: a certified abstract of line 31 of the shipping articles for SS AFRICAN DAWN, and a certified copy of pages 21 and 22 of the vessel's official logbook.

In defense, Appellant offered in evidence his own testimony of an oiler on board SS AFRICAN DAWN.

After the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of three months plus six months on twelve months' probation.

The entire decision was served on 21 August 1978. Appeal was timely filed on 24 August 1978 and perfected on 3 March 1980.

FINDINGS OF FACT

On 8 May 1978, Appellant was serving as Fireman/Watertender on board SS AFRICAN DAWN and acting under authority of his document while the vessel was at Port Elizabeth, South Africa.

Appellant was on watch in the vessel's engineroom and was making preparations for getting underway. The Third Assistant Engineer was also present in the engineroom but he was on a different level.

At about 2015, the sentinel valve on the fuel oil service pump lifted as a result of back pressure. This caused a screeching sound and the emission of steam. All of the members of the watch were immediately aware of the occurrence. Since this valve had lifted repeatedly in the past, an oiler, without awaiting instructions from the Third Assistant Engineer, immediately went below to relieve the pressure by opening the dump valve to the auxiliary condenser.

Almost immediately after the valve lifted, Appellant mounted some of the stairs leading to the level on which the Third Assistant was standing. At this time, due to the high noise level, Appellant shouted to the Third Assistant that the back pressure was blowing below. In response, the Third Assistant tersely informed Appellant that he was aware of the situation and ordered him to "get back down." Appellant, disturbed by the manner in which he was being addressed, told the Third Assistant not to talk to him that way but to speak to him like he was a man. The Third Assistant again yelled to Appellant to "get back down below."

Appellant then mounted the remaining steps and stood a short distance from the Third Assistant Engineer. Appellant informed the officer that he did not like him very much, to which the Third Assistant replied that the feeling was mutual. Appellant further informed the watch officer that he could have him thrown off the watch. The latter replied that if anyone was going to be thrown off the watch, it would be Appellant.

Appellant asked the Third Assistant Engineer to remove his glasses. When he declined to do so, Appellant reached across with his left hand, removed the officer's glasses, and struck him weakly on the jaw with this right fist. The blow did not stagger the Third Assistant nor did it require him to seek medical treatment.

The watch officer pushed Appellant away and immediately called the Chief Engineer who on arrival ordered Appellant out of the

engine room. Appellant immediately complied with that order and left the engineroom without comment.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that: the Administrative Law Judge erred in finding the Appellant guilty of wrongfully assaulting with his hand the Third Assistant Engineer.

APPEARANCE: Sidney H. Kalban, Esq., Phillips and Cappiello, PC, 346 W. 17th ST., New York, New York, 10011.

OPINION

In his brief on appeal Appellant argues that the Administrative Law Judge erred in finding that Appellant struck the Third Assistant Engineer with his hand. This is the only point of appeal raised by Appellant. Pertinent to the specification of the charge of misconduct is the testimony of two witnesses, the only observers of this event. One witness, the Appellant, maintains that he never struck the Third Assistant Engineer. The other witness, the Third Assistant Engineer, maintains that the Appellant did in fact strike him. There is a total divergence of testimony here which the Administrative Law Judge resolved in favor of the Third Assistant Engineer. In essence then, Appellant is asking that the Findings of Fact of the Administrative Law Judge be set aside. This I decline to do.

Where there is a conflict in the testimony, it is the duty of the Administrative Law Judge to resolve that conflict. As has been held, "it is the function of the Administrative Law Judge to hear the evidence, determine the credibility of the witnesses, and decide the weight to be given to the evidence." Decision on Appeal No. 1964. Here, there can be little doubt that the Administrative Law Judge performed his proper function. There was a clear conflict between the testimony of Appellant and the testimony of the Third Assistant Engineer and obviously the Administrative Law Judge resolved the conflict in favor of the Third Assistant Engineer. Moreover, "there is no impropriety in his acceptance of only part of the evidence of any witness and rejection of the remainder." Decision on Appeal No. 1964.

The findings of fact of an Administrative Law Judge should be reversed only in narrow circumstances. For example, where the findings are clearly erroneous from the record they will be reversed on appeal, but such is not the case here. There is substantial evidence in the record (i.e. the testimony of the Third Assistant Engineer) which supports the Administrative Law Judge's

finding of fact. The other cause to reverse a finding of fact is to show that it was arrived at in an arbitrary and capricious manner. However, Appellant has not shown that this is the case, and, "absent a clear showing of arbitrary and capricious action by the trier of fact concerning the issue, his determination will not be disturbed." Decision on Appeal No. 2017. Accordingly, the findings of fact of the Administrative Law Judge are affirmed.

CONCLUSION

The decision and order of the Administrative Law Judge are supported by reliable and probative evidence in the record.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 10 August 1978, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 23RD day of March 1981.